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No. 85-874

In the Supreme Court of the United States

OCTOBER TERM, 1985

HACKNEY, INC., AND WAYNE SCHWEDLAND, PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE SALEM
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Acting Associate Solicitor

CAROL A. DE DEO
Deputy Associate Solicitor

ANDREA C. CASSON
BARBARA J. JOHNSON
Attorneys
Department of Labor
Washington, D.C. 20210

22pp

QUESTION PRESENTED

Whether a magistrate's finding of probable cause justifying the issuance of an inspection warrant under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, may be challenged on the basis of evidence that was not before the magistrate, in the absence of a showing that the warrant application contained an intentional misstatement or omission or a misstatement or omission made in reckless disregard of the truth.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 17

TABLE OF AUTHORITIES

Cases:

Brock v. *Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 ..... 9, 11, 12, 13, 15

Donovan v. *Wollaston Alloys, Inc.*, 695 F.2d 1 9

Franks v. *Delaware*, 438 U.S. 154 ..... *passim*

Marshall v. *Barlow's, Inc.*, 436 U.S. 307 ..... *passim*

Marshall v. *Chromalloy American Corp.*, 589 F.2d 1335, cert. denied, 444 U.S. 884 9

Marshall v. *Milwaukee Boiler Manufacturing Co.*, 626 F.2d 1339 11

Marshall v. *Shellcast Corp.*, 592 F.2d 1369 11

Mosher Steel-Virginia v. *Teig*, 327 S.E.2d 87 ..... 13, 14, 15

Stoddard Lumber Co. v. *Marshall*, 627 F.2d 984 9

Page

Constitution and statute:

U.S. Const. :

Amend. IV ..... *passim*

Amend. V 2

Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* :

29 U.S.C. 657(a) 6

29 U.S.C. 657(a)(1) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 769 F.2d 650. The opinion of the district court (Pet. App. B1-B10) is reported at 583 F. Supp. 773.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1985, and a petition for rehearing was denied on August 23, 1985 (Pet. App. D1). The petition for a writ of certiorari was filed on November 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 26, 1982, a compliance officer for the Occupational Safety and Health Administration (OSHA) attempted to conduct an inspection of the manufacturing plant operated by petitioner Hackney, Inc., located in Enid,

Oklahoma. The plant manager, petitioner Wayne Schwedland, refused to permit the inspection to take place. Pet. App. B1. The Secretary of Labor, through his agents, subsequently applied to a federal magistrate for an administrative search warrant authorizing an inspection of the plant (*id.* at A2, B1-B2). The application for the warrant contained the affidavit of an OSHA Supervisory Industrial Hygienist stating that the plant had been selected for inspection pursuant to a programmed health inspection plan providing for periodic inspections of places of employment; the affidavit explained that the purpose of the inspection was to determine whether the conditions at the plant complied with the Occupational Safety and Health Act and the regulations promulgated thereunder (*id.* at A2-A3, B8). The supporting materials attached to the affidavit included a copy of the OSHA programmed health inspection plan, documents describing the Standard Industrial Classification (SIC) code applicable to the plant, and a history of OSHA inspections of the Hackney plant (*id.* at A2-A4, B8-B9). The magistrate found that the Secretary had established administrative probable cause to inspect Hackney's premises and issued the warrant (*id.* at A2, B2). Plant manager Schwedland, however, again refused to permit OSHA agents to enter the plant (*ibid.*).

2. The Secretary instituted civil contempt proceedings in the United States District Court for the Western District of Oklahoma based upon petitioners' refusal to permit the inspection authorized by the warrant (Pet. App. A2, B2). Petitioners filed a counterclaim seeking a declaratory judgment that the warrant was not supported by probable cause and that OSHA's plan for selecting plants for health inspections was invalid (*ibid.*).[1] Petitioners sought discovery of information that was not presented to the magistrate

[1]Specifically, petitioners argued that the Secretary's inspection plan was unreasonable under the Fourth Amendment and discriminatory under the Fifth Amendment, and that the plan had been adopted in

in the warrant application in order to support their claims (*id.* at A5, B2). The Secretary contended that such discovery was improper because petitioners' challenge to the validity of the warrant could only be based upon the information before the magistrate who issued the warrant, absent a showing that the warrant application contained intentionally or recklessly false statements. The district court referred the discovery dispute to the magistrate, who denied petitioners' request for discovery, holding that discovery was available only to obtain evidence that was submitted in the warrant application. The district court affirmed the magistrate's order, but conditionally permitted petitioners to introduce at trial evidence that was not included in the warrant application. *Id.* at B3.

The district court held that the warrant was supported by probable cause, and that petitioners' refusal to permit the inspection to take place therefore constituted civil contempt of court (Pet. App. B1-B10). The court stated that "the traditional requirement that review of the [validity of a] warrant be confined to the 'four corners' of the [warrant] application is applicable to a review of administrative inspection warrants" (*id.* at B3). It observed that this Court in *Franks* v. *Delaware*, 438 U.S. 154 (1978), held in the criminal context that "review of a search warrant must be limited to examination of materials presented to the magistrate, in the absence of intentional or grossly negligent false statements made to the issuing magistrate" (Pet. App. B3), and concluded that the same rule should apply to administrative inspection warrants.

The district court noted that "administrative probable cause [can] be established by showing that the selected workplace had been chosen for the inspection on the basis

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violation of the requirements set forth in the Administrative Procedure Act. Pet. 5; Pet. App. B4.

of an administrative plan derived from neutral sources" (Pet. App. B3-B4). It held that the *Franks* rule barred petitioners from introducing extrinsic evidence to challenge the validity of the OSHA inspection selection plan described in the warrant "absent some indication of invalidity within the four corners of the warrant application" (Pet. App. B4). To hold otherwise, the court concluded, "would render the four corners requirement meaningless in review of inspection warrants" (*id.* at B5-B6 (footnote omitted)).

The court found that petitioner Hackney's Fourth Amendment protection against unreasonable searches was adequately protected "by reviewing the warrant on the same basis as did the magistrate, that basis being an assurance that OSHA's selection of Hackney for inspection was pursuant to a neutral plan. To provide further review would require the Court to set a higher standard than did the Supreme Court in [*Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978)], and, given an intrusion that is decidedly less substantial than most intrusions protected by fourth amendment jurisprudence, the Court is unwilling to do so" (Pet. App. B7).[2]

Considering the evidence presented to the magistrate in this case, the district court found that OSHA's health inspection plan constituted "a general administrative plan for the enforcement of OSHA regulations * * * derived

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[2]The district court also suggested, in dicta, that an employer could submit to an inspection and challenge the validity of the inspection selection plan in proceedings before the Occupational Safety and Health Review Commission relating to any citations issued as a result of the inspection (Pet. App. B5-B7). Although the Secretary has taken the position that review of the inspection selection plan in such proceedings is similarly limited to the information presented to the magistrate, that issue is not before this Court because the court of appeals expressly declined to decide whether petitioners have any "post-inspection rights" to challenge the validity of the plan (*id.* at A6 n.2).

from neutral sources" and concluded that the Hackney plant had been "selected [for inspection] pursuant to the plan" (Pet. App. B9). The court therefore upheld the validity of the warrant.[3]

3. The court of appeals unanimously affirmed (Pet. App. A1-A6). The court first held that the district court had correctly concluded that the warrant was supported by probable cause. Applying the standard established by this Court in *Marshall* v. *Barlow's, Inc., supra*, the court of appeals found that the warrant was supported by probable cause because "[the] Hackney [plant] was randomly selected for inspection pursuant to a neutral inspection plan" (Pet. App. A5).

The court of appeals rejected petitioners' claim that they should have been permitted to introduce evidence "outside the 'four corners' of the material submitted to the issuing federal magistrate" to demonstrate that the OSHA inspection plan was invalid (Pet. App. A5). The court stated that only the information before the issuing magistrate may be considered in assessing the validity of a warrant. It noted that this Court's opinion in *Marshall* v. *Barlow's, Inc., supra*, observed that inspection warrants could be "executed without delay and without prior notice" (436 U.S. at 316), and did not "envision[] the expanded evidentiary inquiry here sought by Hackney in its efforts to resist an inspection of its plant" (Pet. App. A5). The court of appeals concluded that there is "no reason to impose cumbersome discovery procedures on the enforcement of an OSHA inspection warrant" (*id.* at A6 (footnote omitted)).

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[3]The district court also rejected petitioners' contention that the warrant was overbroad because it allowed OSHA to use personal sampling devices in connection with the inspection (Pet. App. B9-B10).

ARGUMENT

Petitioners repeatedly misstate the issue presented in this case, claiming that the decision below "prevents any [judicial] inquiry whatsoever" concerning the Secretary's plan for scheduling workplace inspections. Pet. 16; see also *id.* at 8, 9. In fact, the courts below *did* review the inspection plan at issue here in the course of determining that the warrant was justified by probable cause. See Pet. App. A5 (court of appeals held that Hackney "was randomly selected for inspection pursuant to a neutral inspection plan"); *id.* at B9 (district court found that plan is "a general administrative plan for ~~the~~ enforcement of OSHA regulations" and that the "plan is derived from neutral sources").

The actual question presented in this case is whether petitioners' challenge to the magistrate's probable cause determination—which necessarily involves consideration of the validity of the inspection plan—should be limited to the facts that were before the magistrate who issued the search warrant. Petitioners contend that they should be permitted to challenge the plan on the basis of evidence that was not included in the affidavit attached to the application for the search warrant; but their position is squarely at odds with this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), holding that information outside the warrant application generally cannot be considered in determining whether the warrant was justified by probable cause. The court of appeals' determination that *Franks* precludes petitioners' claim is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court therefore is not warranted.

1. a. The Occupational Safety and Health Act authorizes the Secretary of Labor to "inspect and investigate" any place of employment within his jurisdiction in order to carry out the purposes of the Act (29 U.S.C. 657(a)). In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), this Court

held that the Fourth Amendment requires the Secretary to obtain a warrant before he may conduct a nonconsensual inspection. The Court emphasized, however, that "[p]robable cause in the criminal law sense" is not needed to justify the issuance of a warrant (436 U.S. at 320-321 (citation and footnotes omitted)):

> For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

The Court stated that the requirement of a warrant would curb the "unbridled discretion" of enforcement personnel (*id.* at 323) without "impos[ing] serious burdens on the inspection system or the courts" (*id.* at 316).

The Secretary conducts two types of inspections under the Occupational Safety and Health Act—inspections initiated based upon specific evidence of a violation and inspections pursuant to a general enforcement plan providing for periodic inspections of places of employment in order to detect violations of the statute (see *Barlow's*, 436 U.S. at 320-321). In the present case, the application for the warrant was based upon a general plan for "programmed" inspections under which OSHA focuses its limited enforcement resources on industries in which employees are subject

to a significant risk of adverse health effects (Attachment to Affidavit of James E. Brown III, supporting warrant application, consisting of OSHA Instruction CPL 2.25B and attachments).[4] The plan specifies the Standard Industrial Classification (SIC) code categories for businesses in which employees are subject to a high degree of health hazard because of the toxic substances found in the work environment. It then sets forth inspection priorities based on the magnitude of that health hazard.

The plan also contains the names and addresses of employers organized by SIC code. These "establishment lists," which are prepared by a private contractor, are used by regional OSHA offices as the basis for scheduling inspections. Each regional office may inspect establishments in the order that is most efficient, but, with limited exceptions, each establishment must be inspected before a new inspection cycle is begun. The Oklahoma Area Office—the office that obtained the warrant at issue here—inspected employers in the order in which they appeared on the list.

The courts below correctly determined (Pet. App. A3-A4, B8-B9) that the facts set forth in the warrant application here established probable cause because they showed that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (*Barlow's*, 436 U.S. at 321). The warrant application contained a detailed explanation of the selection plan, and was accompanied by a copy of the plan itself, the description of the SIC

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[4]At the time the warrant was issued in this case, inspections were covered by OSHA Instruction CPL 2.25B. Because OSHA instructions frequently are updated, however, that instruction has been superseded. The current instruction, CPL 2.45A, sets forth the same method for identifying and ranking high-hazard industries, but specifies a slightly different process for selecting particular establishments for inspection.

code applicable to petitioner Hackney's plant, a copy of the page of the establishment list containing petitioner Hackney's name, petitioner Hackney's inspection history, and a sworn statement that the plant had been selected pursuant to the criteria set forth in the plan. The courts of appeals repeatedly have found similar applications sufficient to satisfy the administrative probable cause requirement. See, *e.g.*, *Donovan* v. *Wollaston Alloys, Inc.*, 695 F.2d 1, 5 (1st Cir. 1982); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984, 988 (9th Cir. 1980); *Marshall* v. *Chromalloy American Corp.*, 589 F.2d 1335, 1342-1343 (7th Cir.), cert. denied, 444 U.S. 884 (1979).[5]

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[5]*Brock* v. *Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110 (5th Cir. 1985), is not, as petitioners erroneously suggest (Pet. 14 n.34), to the contrary. In *Gretna*, the court concluded that while the Secretary had provided sufficient evidence that he had adopted a neutral plan, he had not adequately demonstrated "the methodology employed in selecting the actual business at issue" (769 F.2d at 1113). The court stated that the Secretary should have provided either the actual establishment list or a description of the selection process. In this case, the warrant application contained both the page from the establishment list identifying Hackney, and the thorough description of the selection procedure set forth in the inspection plan. Petitioners' assertion (Pet. 14 n.34) that *Gretna* requires the Secretary to furnish "facts in support of OSHA's choice of SIC code" is simply wrong. In fact, the Fifth Circuit refused to require factual justifications of this type: "It is not the function of the court to question the Secretary's underlying decision that a particular toxic substance is a threat to the health of workers or, for example, to second-guess the Secretary's interpretation of the scientific or medical evidence analyzed in the development of the plan" (769 F.2d at 1113).

Petitioners attempt to cast doubt on the reasonableness of the inspection at issue here by making a variety of assertions concerning the factual circumstances surrounding the inspection (see Pet. 5-6). It is noteworthy that the court of appeals specifically rejected the claim that Hackney had been singled out for an unusually large number of inspections (Pet. App. A4), and the district court expressed doubt concerning petitioners' claim that the plant had been placed in the wrong SIC code (*id.* at B8 n.6).

Petitioners' claim is that the sufficiency of the affidavit on its face is beside the point; they contend that the district court should have permitted them to challenge the validity of the Secretary's inspection plan on the basis of evidence that was not before the magistrate who issued the warrant. This Court considered a similar argument in *Franks* v. *Delaware, supra.* The issue in *Franks* was whether a defendant in a criminal proceeding could introduce evidence that was not considered by the magistrate who issued the search warrant in order to challenge the sufficiency of the showing of probable cause in the affidavit supporting the warrant. This Court stated that "[t]here is * * * a presumption of validity with respect to the affidavit supporting the search warrant" and held that the party challenging the validity of a warrant can go behind the facts set forth in the affidavit only if his claim is supported by "allegations of deliberate falsehood or of reckless disregard for the truth * * * accompanied by an offer of proof" (438 U.S. at 171).

The Court observed that several considerations weighed against permitting a party challenging a warrant to introduce evidence that was not considered by the magistrate who issued the warrant. For example, it noted that the Fourth Amendment interests of the party challenging the warrant were "protected by [the] requirement that applicants for a warrant submit a sworn affidavit and by the magistrate's independent determination of sufficiency based on the face of the affidavit" (438 U.S. at 166). In this connection it is relevant that "the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit supporting a warrant application" (*ibid.*). The Court found that these and other considerations favoring the exclusion of evidence that was not considered by the issuing magistrate are outweighed only where the party challenging the warrant can show that the affidavit supporting the warrant contains deliberate falsehoods or statements made in reckless disregard of the truth.

Petitioners do not dispute that the rule set forth in *Franks* would bar their challenge to the inspection plan if *Franks* were applied in this context. Indeed, the argument pressed by petitioners is indistinguishable from the claim considered by the Court in *Franks*. In both cases the party challenging the warrant sought to introduce evidence that was not before the issuing magistrate in order to challenge the magistrate's finding that the application for a warrant established probable cause.

Petitioners instead argue (Pet. 14-16) that *Franks* does not apply here because the warrant was issued pursuant to the Secretary's enforcement plan rather than on the basis of an allegation of the existence of a statutory violation. However, the courts of appeals have concluded that *Franks* applies in the present context. *Brock* v. *Gretna Machine & Ironworks, Inc.*, 769 F.2d 1110, 1114 (5th Cir. 1985); *Marshall* v. *Milwaukee Boiler Manufacturing Co.*, 626 F.2d 1339, 1346 (7th Cir. 1980); Pet. App. A5-A6.

The considerations underlying *Franks*—including the interest in judicial economy and finality of magistrates' probable cause determinations—apply with equal force to justify a limit upon challenges to probable cause determinations based upon administrative inspection plans. Moreover, contrary to petitioners' assertions (Pet. 15), the Occupational Safety and Health Act explicitly contemplates that the Secretary will exercise his inspection power "without delay." 29 U.S.C. 657(a)(1); see *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369, 1372 (5th Cir. 1979). If employers such as Hackney are permitted to transform every warrant enforcement proceeding into a full-scale evidentiary hearing, complete with wide-reaching discovery far removed from the magistrate's narrow inquiry, employers could delay every OSHA inspection. Such extensive litigation over the inspection plan and selection process plainly is inconsistent with this Court's indication in *Barlow's* that the

resources required by the warrant enforcement process would not "exceed manageable proportions" (436 U.S. at 321).

In addition, the magistrate's review of the inspection plan in the context of a warrant application provides full protection for employers' Fourth Amendment interests. *Barlow's* held that the probable cause standard is satisfied if the affidavit shows that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (436 U.S. at 321). A magistrate presented with the enforcement plan and the reasons for the selection of the particular employer surely is equipped to determine whether the *Barlow's* test has been satisfied.[6]

Petitioners' assertion (Pet. 8) that this result "denies the Fourth Amendment rights of an estimated six million employers" thus is obviously incorrect. Employers' Fourth Amendment rights are protected because the magistrate must conclude that the *Barlow's* test has been satisfied before he issues a warrant. Moreover, as in the present case, the magistrate's determination is subject to review on the basis of the materials submitted with the warrant application. What petitioners seek is more extensive judicial review of a probable cause determination, but this Court concluded in *Franks* that the information supplied to the issuing magistrate provides the appropriate basis for assessing the propriety of the probable cause determination. For

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[6]Indeed, petitioners adopt (Pet. 12-13) as the appropriate analysis the test described by the court in *Brock* v. *Gretna Machine & Ironworks, Inc., supra*, and that court expressly stated that "[i]n determining the validity of the warrant we will look no further than the application itself * * * and any sworn testimony given in conjunction therewith" (769 F.2d at 1113). Petitioners thus recognize that the inspection plan is subject to appropriate scrutiny when the magistrate determines whether or not to issue the warrant.

these reasons, the court of appeals correctly held that petitioners may not go beyond the "four corners" of the warrant application in challenging the factual basis for the issuance of the warrant in this case.

b. Petitioners contend (Pet. 12-15) that the court of appeals' decision conflicts with the decision of the Fifth Circuit in *Brock* v. *Gretna Machine & Ironworks, Inc.*, *supra*, and the decision of the Virginia Supreme Court in *Mosher Steel-Virginia* v. *Teig*, 327 S.E.2d 87 (1985). Both claims are without merit. In *Gretna*, the Fifth Circuit found that the warrant application did not establish probable cause and dismissed the Secretary's complaint seeking a civil contempt order. With respect to the question presented here, the *Gretna* court reached the same conclusion as the court below, rejecting the employer's claim that it was entitled to conduct discovery in support of its counterclaim that the Secretary's health inspection plan was unreasonable under the Fourth Amendment. The court stated that it would not look beyond the evidence presented to the magistrate in reviewing the magistrate's probable cause determination, observing that "[t]he magistrate must decide whether to issue the warrant based on information provided by the application or in qualified conjunction with the application. Judicial review of the validity of the search warrant is based on that same evidence" (769 F.2d at 1114).

Mosher similarly does not conflict with the court of appeals' decision in this case. In *Mosher*, the Virginia Supreme Court considered a warrant issued pursuant to the Virginia Occupational Safety and Health Act, and concluded that the warrant application did not establish probable cause (327 S.E.2d at 94). The state court adopted a state law standard governing the type and quantum of information that a state agency must present in order to establish administrative probable cause (*id.* at 93). Although this state standard obviously is inapposite here,

most of the "specific facts" which the Virginia court would require the state agency to provide in a warrant application—*e.g.*, the criteria used to designate high hazard industries, the method by which establishment lists are compiled, a description of the selection process, and the employer's inspection history—were present in the instant case. In any event, *Mosher* concerns state law and cannot affect the requirements imposed by the federal statute.

Since the *Mosher* court held that the affidavits on their face did not satisfy the probable cause standard, its statement (327 S.E.2d at 92 (footnote omitted)) that an employer may "adduce[] evidence beyond the limits of the supporting affidavit" in challenging a warrant based on a general inspection plan is simply dictum. This is especially true because the court expressly declined to address a basic issue in this case—whether an employer may conduct discovery into the design and operation of the inspection plan (327 S.E.2d at 94). Finally, it is noteworthy that the court's dictum regarding the consideration of evidence not contained in the application for the warrant was preceded by a quotation from the Virginia Constitution's prohibition upon general warrants (see *id.* at 92); the court's conclusion therefore may rest upon its interpretation of the State Constitution rather than the Fourth Amendment. For these reasons, there is no conflict between the decision below and *Mosher* warranting review by this Court.

2. Petitioners also attempt to avoid the effect of *Franks* by dressing their challenge to the warrant in different procedural garb. First, they argue (Pet. 10-13) that because the Secretary intitiated this civil contempt action, they should be permitted to assert a counterclaim challenging the validity of the inspection plan. This "counterclaim" is nothing more than a different label for petitioners' challenge to the

sufficiency of the magistrate's probable cause determination. As we have discussed, the probable cause determination necessarily encompasses consideration of the validity of the inspection plan; the counterclaim is simply an effort to circumvent the limitations imposed by *Franks* upon review of the magistrate's determination. It is thus not surprising that the district court stated that it was "inclined to agree" with the magistrate's characterization of petitioners' counterclaim as "a 'fishing expedition' designed for the purpose of avoiding the four corners requirement" (Pet. App. B6 n.2).

Petitioners' assertion of the "counterclaim" cannot alter the standard applicable to review of the magistrate's probable cause determination.[7] *Franks* therefore applies to the declaratory judgment claim as well, precluding the consideration of information that was not before the magistrate when the probable cause decision was made.[8]

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[7]Petitioners note (Pet. 10) that the employer in *Barlow's* raised the unconstitutionality of OSHA's warrantless inspections in a counterclaim. In *Barlow's*, however, the employer challenged the constitutionality of the Act on its face and was not seeking to utilize discovery procedures to attack the validity of a warrant issued pursuant to a particular inspection plan.

[8]Petitioners assert (Pet. 11-13) that the court of appeals' refusal to recognize a declaratory judgment action permitting broad review of the OSHA inspection plan conflicts "in principle" with *Brock* v. *Gretna Machine & Ironworks, Inc., supra*. But *Gretna* did not indicate that *Franks* is inapplicable to such an action. On the contrary, even though the employer in *Gretna* had asserted such a counterclaim, the court expressly stated that "[j]udicial review of the validity of the search warrant is based on [the evidence in the application for the warrant]" (769 F.2d at 1114).

Petitioners also assert that *Mosher Steel-Virginia* v. *Teig, supra*, conflicts with the decision below. As we have noted, however, the state court's discussion regarding *Franks* is dictum and may not be based upon the federal Constitution. That decision therefore cannot be said to present a conflict with the decision in this case warranting review by this Court.

Second, petitioners assert (Pet. 9, 15), without citing any authority, that an employer has a "due process right" to utilize the discovery process set forth in the Federal Rules of Civil Procedure to challenge the OSHA inspection plan. This claim is another recasting of petitioners' challenge to the rule adopted by this Court in *Franks*. Just as a criminal defendant has no due process right to contest the factual allegations in a warrant application, petitioners have no such due process right in this context.[9]

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[9]Petitioners complain (Pet. 16 & n.38) that the court of appeals' decision renders its challenge to the constitutionality of the plan unreviewable. In fact, as we have discussed, the constitutionality of the plan is always reviewable in warrant enforcement proceedings—under the reasonableness standard articulated in *Barlow's* and subject to the evidentiary limitations imposed by *Franks*. Although the Secretary has maintained in other cases (see Pet. 16 n.38) that the *Franks* limitations apply in any type of proceedings in which an employer is challenging the plan, the court of appeals explicitly declined (Pet. App. A6 n.2) to decide if petitioners could obtain review of the inspection plan in post-inspection proceedings. That issue therefore is not presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE SALEM
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Acting Associate Solicitor

CAROL A. DE DEO
Deputy Associate Solicitor

ANDREA C. CASSON
BARBARA J. JOHNSON
Attorneys
Department of Labor

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